

APL20120003

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APR 03 2012

April 3, 2012

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EDMONDS CITY CLERK

Edmonds City Council
Edmonds, WA

APR 03 2012

PLANNING DEPT.

RE: APPEAL OF PLANNED RESIDENTIAL DEVELOPMENT OF BURNSTEAD
CONSTRUCTION COMPANY WOODWAY ELEMENTARY PLAT/PRD, P-2007-
17/PRD-2007-18.

1. Name/Address/Phone: Cliff Sanderlin and Heather Marks, 10522 235th PI SW, Edmonds, WA 98020-5732. 206-546-8983; 206-409-3255 (cell)
2. Basis for Standing: We are parties of record in this case. We testified at the hearing examiner hearing on February 9, 2012 and, previously, in 2007. We submitted materials for the February 9, 2012 hearing. We live near the subject property and will be subject to adverse impacts and harms should the PRD be approved.
3. Identify the application: The application that is the subject of this appeal is the plat/PRD proposed by Burnstead Construction with file numbers P-2007-17, PRD-2007-18. We also challenge the SEPA DNS as we did previously, in 2007.
4. Our grounds for appeal include, but are not limited to, the following:

FAILURE OF SEPA REVIEW PROCESS: VIOLATION OF ENVIRONMENTAL LAWS GOVERNING CRITICAL AREAS; INSUFFICIENT PROOF THAT THE STORMWATER SYSTEM WILL WORK; POTENTIAL FOR HARM TO THE PEOPLE OF EDMONDS. Examples of these failures and violations include but are not limited to:

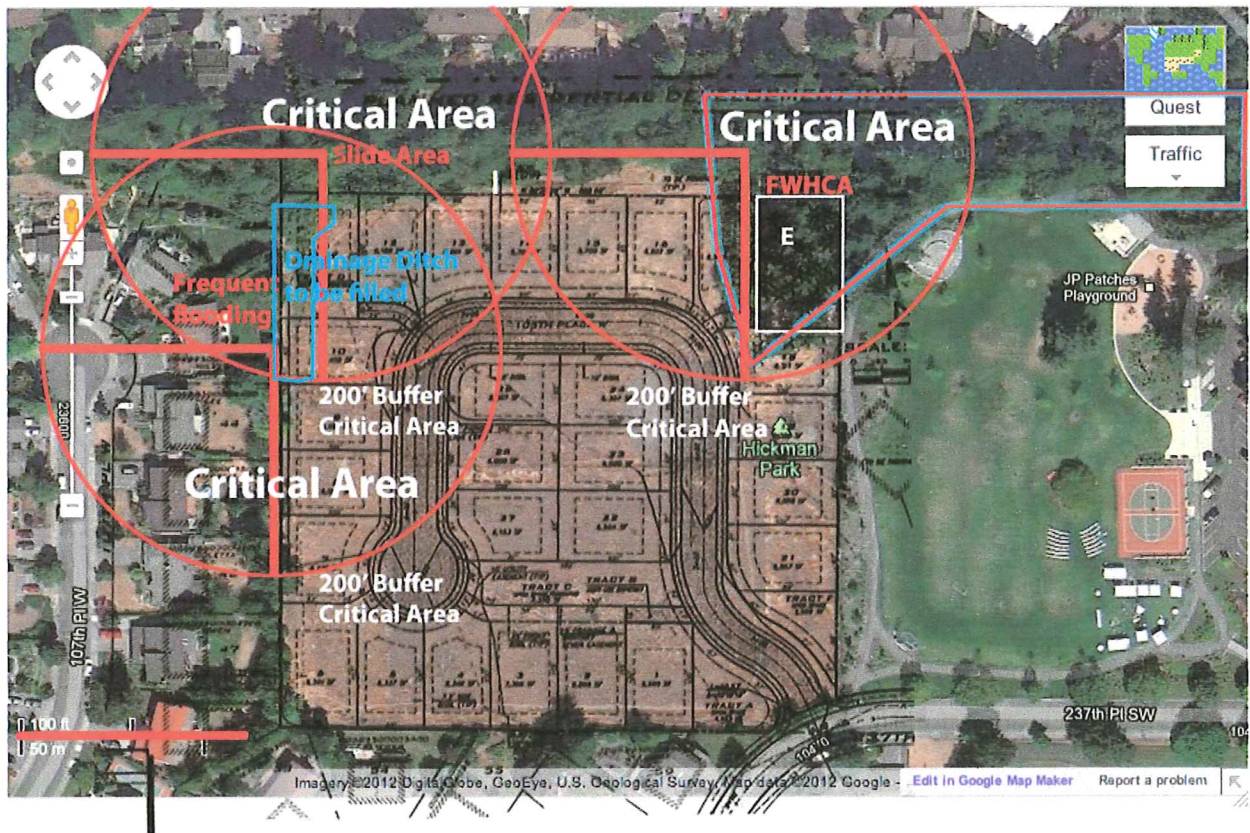
The 2012 Hearing Examiner's erroneous conclusion in Finding of Fact 8 that, "Subsequent decisions by the Superior and Appellate courts have upheld the SEPA decision." A copy of the Superior Court order stating "... the MDNS, subdivision approval, and PRD **approval reversed**" was attached as Exhibit 2 to materials Lora Petso submitted. The City of Edmonds and its Hearing Examiners erred. On April 4, 2011, the State Appellate Court decision confirmed that Lora met her burden under RCW 36.70C.130(1) to demonstrate that the Edmonds Hearing Examiner's land use approvals were incorrect, in part (See page 2 and page 24).

Additional SEPA errors include, but are not limited to:

VIOLATION OF CRITICAL AREAS LAWS - CRITICAL AREA 1: FISH AND WILDLIFE HABITAT CONSERVATION AREA (FWHCA) (see illustration below.)

Critical Areas

Geologically hazardous, frequently flooded, FWHCA



ECDC 23.40_Environmentally critical areas general provisions (including frequently flooded areas) In "quote" marks below

"B3. Frequently flooded areas (see Frequently Flooding in illustration, above left) as designated in Chapter 23.70 ECDC, Frequently Flooded Areas;

B4. Geologically hazardous areas as designated in Chapter 23.80 ECDC, Geologically Hazardous Areas (See Slide Area top left); and

B5. Fish and wildlife habitat conservation areas as designated in Chapter 23.90 ECDC, Fish and Wildlife Habitat Conservation Areas (see downward anvil-shape of FWHCA under Critical Area designation in upper right corner, extending into building lots. With the required 200-foot buffer five building sites will be disallowed.)

ECDC 23.40 C. All areas within the city of Edmonds meeting the definition of *one or more critical areas*, regardless of any formal identification, are hereby designated critical areas and are subject to the provisions of this title.

D. Areas Adjacent to Critical Areas Subject to Regulation. Areas adjacent to critical areas shall be considered to be within the jurisdiction of these requirements and regulations to support the intent of this title and ensure protection of the functions and values of critical areas. 'Adjacent' shall mean any activity located:

1. On a site immediately adjoining a critical area; and
2. Areas located within 200 feet of a subject parcel containing a jurisdictional critical area. [Ord. 3527 § 2, 2004]."

Regarding Fish and Wildlife Habitat Conservation Area Critical Area, the hearing examiner's Finding 6 is incorrect. Both the SEPA checklist and the application narrative clearly identify that the subject property land development is, in fact, adjacent to a Fish and Wildlife Habitat Conservation Area on site (see 2007-1 Statement of Compliance, page 2; and map in 2007-11). Tract E of the plan and building lots 15, 16, 17, 18 and 19 infringe on the required 200-foot buffer zone south of the Fish and Wildlife Habitat Conservation Area inhabited by two wildlife species of concern, the band-tailed pigeon and pileated woodpecker. See ECDC 23.40.320 Definitions, parag. 2, "Adjacent" means those areas within 200 feet..."

The Fish and Wildlife Habitat Conservation Area (FWHCA) is part of a state designated Urban Natural Open Space (UNOS) (Exhibit 1) and provides habitat for the band-tailed pigeon and pileated woodpecker. The FWHCA follows a former streambed that is now covered by portions of the nature trail along the panhandle at the northern edge in Hickman Park. The 200-foot buffer required around the above-mentioned critical area overlaps a **Steep Slope Slide Critical Area** (see illustration p. 2) and both lie within an urban forest that provides a wildlife connection corridor from the Town of Woodway to well beyond the old Woodway High School property. In approving the initial MDNS in 2007, the City of Edmonds illegally removed or ignored the critical area designation without contacting the Washington State Department of Ecology. In 2007 we testified that the applicant's wildlife biologist presented erroneous information (see ERRONEOUS INFORMATION below, p. 5). Furthermore, no one in the City of Edmonds contacted the Washington State Department of Fish and Wildlife regarding any proposed alteration of the existing conservation area designation. (ECDC 23.90.040: **Approval for alteration of land adjacent to the fish and wildlife habitat conservation area or its buffer shall not occur prior to consultation with the Washington Department of Fish and Wildlife for animal species, the Washington State Department of Natural Resources for plant species, and other appropriate federal or state agencies.** The City of Edmonds and the applicant violated Edmonds ordinances and State Law in ignoring the Fish and Wildlife Habitat Conservation Area in 2007 and again in 2012 by not contacting the Department of Fish and Wildlife.

Since the 2007 hearing examiner erred with regard to that requirement and the 2012 hearing examiner considered it outside her scope of work, the City is now

poised to proceed with a project that is built on false, incomplete and erroneous information.

VIOLATION OF CRITICAL AREAS LAWS - CRITICAL AREA 2 – STEEP SLOPE SLIDE AREA, WHICH IS CONTIGUOUS TO THE FISH AND WILDLIFE HABITAT CONSERVATION AREA (CRITICAL AREA)

ECDC 23.40.270 Critical areas tracts states that ... critical areas tracts may be required in development proposals for subdivisions, short subdivisions, and planned unit developments. These critical areas tracts shall delineate and protect those contiguous critical areas and buffers greater than 5,000 square feet including: 1) Landslide hazard areas and buffers, 2) Wetlands and buffers, and 3) Fish and wildlife habitat conservation areas.

In ECDC 23.40.020 Relationship to other regulations: item B states that “Any individual critical areas adjoined or overlain by another type of critical area shall have the buffer and meet the requirements that provide the most protection to the critical areas involved. When any provision of this title or any existing land use regulation conflicts with this title, that which provides more protection to the critical area shall apply. The applicant’s proposed 15-foot buffer clearly fails to provide more protection. This plan would jeopardize current and future homeowners in the development and adjacent to it, and wildlife in the corridor.

VIOLATION OF CRITICAL AREAS LAWS - CRITICAL AREA 3 – FREQUENT FLOODING AREA

In addition to the two Critical Areas described above, a third exists along the west side of the property where the applicant plans to fill in a well-established infiltration swale (ditch), raise the surface level of the ground, and build a house within a 200-foot buffer required in 23.40.320. This is illegal per ECDC 23.40.320, “Buffer” ... “means the designated area immediately next to and a part of a steep slope or landslide hazard area and which protects slope stability, attenuation of surface water flows and landslide hazards reasonably necessary to minimize risks to persons or property...”, the applicant’s plan ignores the 200-foot buffer required under 23.40.320 Definitions, Best Practices, parag. 3, ...must “...minimize adverse impacts to surface and ground water....flow, and circulation patterns...” The applicant and City of Edmonds violate three overlapping Critical Areas, thus disqualifying 13 proposed building lots.

FURTHER FAILURES OF THE SEPA PROCESS FOLLOW.

REGARDING UNDERGROUND WIRING: The order of the County Superior Court requires a condition that no variance from underground wiring requirements be permitted.

PROPERTY ENCROACHMENT ON THE WESTERN BOUNDARY: The applicant intends to remove a cyclone fence built by the Edmonds School District and expropriate from 3.6 inches to 15.6 inches from adjacent neighbors’ back yards on the west and south side, including mature trees and shrubs that some landowners have maintained for three decades. Without appropriating that strip

of property, the percentage of open space needed for the project will drop below the minimum required.

TRAFFIC/PARKING: The hearing examiners in 2007 and 2012 erred in failing to consider traffic and parking impacts. The hearing examiner in 2007 did not accept that 250 new vehicle trips a day from the PRD would exacerbate traffic congestion at the double-stoplight controlled intersection at 238th SW and Firdale Way, pose danger to pedestrians along 237th SW and/or crossing 104th Street at 238th SW on their way to Hickman Park and/or Klahaya Swim Club. The 2007 hearing examiner was apparently unaware that Hickman Park would be built with grossly inadequate parking space. Even though the City Administration in 2007 was aware of heavy on street parking during Klahaya swim meets, it left existing and future parking needs out of its plan. The 2012 hearing examiner, in stating that traffic congestion and pedestrian hazards were outside the scope of the remand order, failed to take into consideration that Hickman Park did not exist in 2007 or that traffic and parking issues have increased dramatically. These are major omissions. Now, as our “court of last resort” in addressing problems of traffic, parking and pedestrian safety, we ask that you halt further development in the area until the problem is thoroughly reviewed.

CONDITION 9 MAY NOT BE ALTERED since the ADB, the hearing examiner, and the Superior Court all relied upon that condition in determining compliance with ECDC 20.35.040.

The SEPA DNS was based on 66,000 square feet of impervious surface over the subject property. The 2012 hearing examiner’s condition, allowing 3000 square feet per lot, for 27 lots, allows 81,000 square feet even before calculating the area covered by the street, sidewalks or driveways. This clearly requires a new SEPA review.

ERRONEOUS INFORMATION. ECDC 23.90.040 Development standards – Specific habitats. A. Endangered, Threatened, and Sensitive Species. 2. Whenever activities are proposed adjacent to a fish and wildlife habitat conservation area with which state or federally endangered, threatened, or sensitive species have a primary association, such area shall be protected through the application of protection measures in accordance with a critical areas report prepared by a qualified professional and approved by the director.

The professional **biologist who presented a wildlife report for the original SEPA presented Erroneous Information.** Heather Marks demonstrated in testimony to the 2007 hearing examiner that the applicant’s wildlife study prepared by Wetlands Resources, Inc. was seriously flawed and based on an evaluation of the wrong property, with very different characteristics from the applicant’s property. Yet the City’s Planning Division and hearing examiner accepted the report. An informal Department of Ecology review of the wildlife report appears in the Exhibits below. For more information, Heather’s 2007 testimony is in the public record and otherwise available, titled: “Remand Hearing for Old Woodway Elementary PRD by Burnstead Construction, Documentation of Fish & Wildlife Habitat Conservation Area protection, Edmonds, WA, Aug. 31, 2007.”

FAILURE TO CORRECTLY APPLY PRD REQUIREMENTS, including but not limited to:

1. The requirement of ADB review in ECDC 20.35.080(3) that the proposal be reviewed by the ADB prior to hearing examiner approval and the requirement in ECDC 20.35.040A3 that the ADB approve the buildings. The hearing examiner erred in concluding, on page 18, that the requirement for ADB approval could be waived based on testimony from staff, or by contending, on page 19, that only conceptual building designs are required. ECDC 20.35 clearly requires that the actual design of each building be provided. Applicant may not rely on general conceptual designs and unsubstantiated statements that all the houses will fit on their respective lots and comply with all other City requirements including but not limited to positioning of garages and their entrances. ADB review is particularly critical since these changes subvert the ADB approval process and appears to permit half of the proposed home designs to be too large to fit on their proposed lots.
2. An illegal rezone: PRDs may not increase density. However, considering the right of way calculations from the drainage plan, only 24.8 RS-8 homes would fit on the site. Therefore, allowing 27 homes is an illegal rezone.
3. Lack of safe and efficient site access (ECDC 20.35.040(a2)). In the 2012 Remand Staff Report: VIII, B, 2, (b) Efficient and safe circulation: A “50-foot right-of-way terminating in a cul-de-sac would serve the new homes and meet public safety requirements without significantly affecting traffic levels or patterns in the neighborhood.” THIS IS NOT TRUE: The current plan calls for only one 50-foot opening (right-of-way) to 237th PI SW for both ingress and egress, and the interior street ends in a cul-de-sac. The narrow width and vehicular angles required to turn into the 50-foot opening onto 237th PI SW will impede passage by large fire engines and other large vehicles. This problem will be exacerbated by parked vehicles on either side of that entrance. Heavy in and out traffic at that on 237th SW will create a hazard to residents of Woodway Meadows, people on their way to Hickman Park and Klahaya Pool, and to the long-time homeowner directly across 237th, who is confined to a wheelchair.
4. Lack of compliant lots and buildings under ECDC 20.35.060A4, 20.35.060B3, 20.35.060A1; and 20.35.060B1, lack of 10 percent usable open space (since Tract E is within a required 200-foot buffer zone of a WFWD Critical Area. According to the SEPA Checklist and applicant narrative, it may not be counted toward usable open space. Tract A and F may not be counted as they cannot be considered “usable open space” for safety reasons.”
5. Finding 7h (perimeter buffer) repeats the prior failure to buffer the north and west sides, and the separate requirement for adequate buffering is not met.

There is an error either in that the proposed homes don't fit on the property, or an error that the application does not include proposed home designs as required.

6. Condition 9 may not be altered since the ADB, the hearing examiner, and the Superior Court relied upon that condition in determining compliance with ECDC 20.35.040. See for example the ADB minutes at 9 or the memorandum decision at 24.

7. Without condition 9 the plat fails to minimize impervious surfaces as required by ECDC 20.35.050A3 as shown in the drainage reports where pervious surfaces are reduced from 2.71 acres to 2.63 acres. The change from 35 percent impervious surface per lot to 3000 square feet impervious surface per lot plainly does not "minimize" impervious surfaces. Contrary to the hearing examiner's 2012 conclusions, that change is substantive and invalidates the PRD proposal.

8. Further, the condition requiring deed restrictions on perimeter lots (2007-14) must be retained since it was relied upon by the Superior Court in finding compliance with ECDC 20.35.030 at page 23 of the memorandum decision. Finally, the proposal does not comply with Comprehensive Plan requirements, particularly regarding drainage.

FAILURE TO CORRECTLY APPLY SUBDIVISION REQUIREMENTS, including but not limited to:

1. That there be no offsite drainage impacts (ECDC 20.35. 080A4) since eliminating the drainage swale constructing homes, increasing impervious surfaces, and building a vault with overflow to 237th will *all* increase off site and downstream impacts.

2. Other subdivision errors include the illegal street into the cul de sac. The hearing examiner (2012) erred in concluding this was outside the scope of the proceeding since the appellate court clearly required that the project comply with all applicable laws, and the street configuration and size have a direct correlation to the court-allowed topic of open space.

3. Ignoring the purpose statements and sense of both state and local subdivision ordinances (protection of public safety, interest and property, provision of adequate services, improvement rather than reduction of environmental protections.)

FAILURE TO CORRECTLY APPLY VESTING REQUIREMENTS including but not limited to:

1. Attempting, in Condition 8, to waive the requirements of the state's 1992 stormwater manual for testing methodology (see 2012-5 page iii and AES letter at page 3). Under Washington law, vesting cannot be waived. The

applicant's drainage expert testified that they would not follow the 1992 manual requirements in designing the lot infiltration systems, which is illegal.

2. He also testified they would test for a good location on each lot for **each site's infiltration drywell**. However, given the restrictions of the state's 1992 stormwater code there is not sufficient space on each lot to ensure that each drywell can perform adequately considering the options available on each site (i.e. most of the surface would be covered by house, driveway and sidewalk.)
3. Adequate testing been not done for a vault of over 100 feet in length.
4. Finally, tests required for **Closed Depression analysis** under the 1992 manual have not been concluded (see discussion below.)

ADDITIONAL ERRORS IN PROPOSED STORMWATER DRAINAGE SYSTEM:

The Old Woodway Elementary School property and surrounding homes on the south and west boundaries are in a **Closed Depression Area**, meaning there is no escape route for water that cannot be absorbed into the ground through infiltration. Hard, nearly impervious soils in the depression area have baffled engineers both Snohomish County (prior to annexation) and the City of Edmonds over the decades to rectify the problem. For many years, some residents living south of the subject property have kept sandbags ready during the winter months.

Based on plans submitted and revised by the applicant, the 2012 Planning Division Remand Staff Report issued a recommendation that the drainage plan be conditionally approved, with final approval at a later date. See page 7 of the Remand Staff Report: "During the civil plan review phase of the development process (the final utility design phase), the drainage design will undergo another technical review and final design and sizing of the system will be determined at that time (Attachment 2012-9). This means that the project can move forward and that *we must trust* the applicant, City of Edmonds Engineering and Planning departments to protect the residents downstream from flooding. The current plan does not show that the applicant's proposed stormwater management system has a significant margin of error in the event of a 100-year storm or even a 10-year storm. This is not acceptable. The potential repercussions and harms are too great.

In response to concerns expressed in 2007 about the PRD plan, the applicant increased the size of a proposed underground vault. However, a similarly sized vault built by the City on the adjacent property (now Hickman Park) does not absorb all the water even from moderate precipitation. The southwest corner of the park has frequent ponding throughout the rainy months and water can be seen running openly along the sidewalk.

ADDITIONAL DRAINAGE ERRORS which were not adequately addressed by the applicant or the Remand Staff Report of 2012 include but are not limited to, the following:

1. The infiltration calculations and storage capacity of the vault do not allow for the likelihood that the vault will already be full or partially full when the new storm event occurs.
2. The hearing examiner has failed to provide for adequate maintenance of the drainage vault as ordered by both courts. Instead, the HWA report at page 2 indicates that the proposed closed lid vault is of a kind that is difficult to maintain. The proposed vault is untested and its capacity will not be known until future 10- or 100-year storms occur. By the time its capacity is known, it will be too late to stop this project and the problem may be unsolvable considering cost and environment regulations governing discharge of stormwater into Puget Sound.
3. The proposed closed lid vault, as designed, will be subject to clogging from debris and siltification (buildup), and the applicant intends to pass the burden of cleaning it to the future property owners in the PRD. The applicant has not demonstrated that the vault system can be maintained under OSHA confined space rules for workers (see OSHA Permit-required confined spaces 1910.146.)
4. Based on correspondence between the City Engineer and its consultant HWA in attachment 2012-8, the applicant used the wrong numbers in its infiltration calculations for the 10- and 100-year storm. The figure of 1.9 and 2.4 should be 2 and 3.
5. The 20/80 split in soil type assumptions is contradicted by the data provided,
6. Hydrograph plots requested by the City were not provided.
7. The applicant based infiltration calculations on pre-development conditions of "secondary growth forest" with the appropriate curve number for the on-site soil type. This section of the applicant's drainage report pre-development includes dirt, grass, dense vegetation and impervious, which would not be acceptable.
8. Eliminating the drainage swale on the western edge of the property and relying on a massive centralized drainage facility are illegal under our comprehensive plan.
9. The stormwater management plan failed to take sufficient soil samples. According to the Stormwater Management Manual for the Puget Sound Basin, 1992, "a soil log should be taken at a minimum of 3 foot depth below the proposed base of the facility and an additional soil log shall be taken for every 5,000 square feet of infiltrating surface area." Each "facility" is presumably each house to be built. That being the case, there should have been at least 27 samples.

CLOSING COMMENTS: Council Members Beware: IF the applicant's preliminary plan is approved, even with conditions, then land clearing,

grading, property sales, and other work will soon begin. After that point, the City will be unable to stop the project, even if the "final design and sizing" of the drainage system plan prove inadequate. Any benefits, such as jobs and fee revenues associated with the applicant's project will be minimal and fleeting, yet the permanent destruction of this valuable open space for an illegal and ill-conceived PRD would be inexcusable.

5. Relief Requested: Denial of the application. In the event the project is not denied, the applicant should post a performance bond of \$1 million or more for a period of at least five years to ensure that the proposed stormwater drainage system functions properly and is maintained to prevent clogging with debris and silt. Property owners in the PRD and outside who are flooded should be fairly compensated by the applicant and the taxpayers of Edmonds should not be expected to fix the problem.

We have read this appeal and believe the contents to be true and accurate.


Cliff Sanderlin


Heather Marks

Date: 04/03/2012

Exhibits for April 3, 2012 Appeal to Edmonds City Council

Exhibit 1 – Department of Fish and Wildlife Correspondence regarding Species of Concern in the Fish & Wildlife Habitat Conservation Area

aug. 30, 2007

Heather,

I looked over the materials and also looked at the map you supplied and also called up a map via google maps. I have one question. The (applicant's wildlife) consultant does not seem to say that there is a WDFW mapped priority habitat area on the map. However, Paul Anderson from Ecology says that the forest to the north is mapped as Urban Natural Open Space (UNOS). Does the consultant have maps delineating the area that's been designated as UNOS? Actually I have another question.

You mentioned something about two species. In particular, the band-tailed pigeon and pileated woodpecker. Are those known occurrence that have been

mapped by our agency or someone else? If so, are they breeding occurrences or were they just individual observations (fly-through, feeding occurrence, etc.)?

Jeff Azerrad
Wildlife Biologist
Washington Department of Fish & Wildlife
2108 Grand Blvd.
Vancouver, WA 98661
Voice: 360.906.6754 Fax:360.906.6776

**Exhibit 2 Review of Applicant's Wildlife Report by Dept. of Ecology
(informal)**

Subject: Review of Burnstead project wildlife report
From: "Anderson, Paul (ECY NWRO SEA)" <paan461@ECY.WA.GOV>
Date: Mon, August 27, 2007 3:05 pm
To: "Cliff Sanderlin" <clifheat@drizzle.com>
Priority: Normal
Options: View Full Header | View Printable Version | Download this as a
file | View Message details | Add to Addressbook

Heather:

I have reviewed the wildlife study prepared by Wetlands Resources, Inc. for the Burnstead Construction project. I have the following comments on the report and the proposal in general:

1. In my reading of the City of Edmonds Municipal Code, the forested portion of the site qualifies as a Fish and Wildlife Habitat Conservation Area (FWHCA) under § 23.90.010.A.3 because it meets the WDFW definition of a priority habitat (Urban Natural Open Space) and § 23.90.010.A.10 (Urban Open Space and Land Useful or Essential for Preserving Connections Between). If the forested area is part of a pileated woodpeckers breeding area or a band-tailed pigeon breeding or regular use area it would provide habitat for priority species, and therefore, qualifies as a FWHCA, whether formally identified or not (Edmonds Municipal Code § 23.90.010.B).
2. The wildlife study does not include a discussion of the Edmonds FWHCA definitions that I reference in paragraph 1.
3. The methods section of the wildlife study does not state the date or time of day of the site visit. Depending on the species of interest, the season and time of day of the survey can greatly influence the species detected. Wildlife surveys generally can only establish species presence, through observation of individuals or sign, and do not conclusively establish that a species is not present without an

intensive study. "Absence of evidence does not establish evidence of absence". The wildlife study does not provide information to determine whether the field survey was done at a time when there would be a high likelihood of detecting priority species, were they present.

4. Page 2 of the wildlife study assesses the overall habitat value of the entire site, concluding that the site has low habitat value due to the sports fields and surrounding residential development. It does acknowledge that the forested portion of the site may provide some habitat for passerines (songbirds) and connects to other off-site forest habitat. However, the wildlife study concludes that the forest stand on this site is too narrow to serve as a wildlife corridor for many wildlife species. Narrow though the forest stand may be, it is still providing habitat connectivity and meets the FWHCA definition under Edmonds Municipal Code §23.90.010.A.10.

If you have any other questions, please let me know.

Paul

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